FILE COPY

FILE
MAY 28

IN THE

Supreme Court of the United States

October Term, 1971.
No. 71-1418.

STARLIE LOMAYAKTEWA, *et al.*,

Petitioner,

vs.

HONORABLE HOWARD F. CORCORAN, United States District Court Judge, ROGERS C. B. MORTON, individually and in his capacity as Secretary of the Interior, and PEABODY COAL COMPANY,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

JAMES W. McDADE, ESQ.,
Attorney for Defendant
Peabody Coal Company.

Of Counsel:

BEST, BEST & KRIEGER,
Post Office Box 1028,
Riverside, Calif. 92502,
(714) 686-1450,

MARVIN O. YOUNG, ESQ.,
Peabody Coal Company,
301 North Memorial Drive,
St. Louis, Missouri 63102,

McDADE AND LEE,
1130 Seventeenth Street,
Washington, D. C. 20036.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia 1

Conclusion 5

TABLE OF AUTHORITIES CITED

Cases

Cross-Florida Barge Canal, In re, 329 F.Supp. 543 (1971) 2

Friends of the Earth v. Armstrong, Civil No. 3273-70 (D.D.C. 1971) 2

Gulf Oil Corporation v. Gilbert, 330 U.S. 501 (1947) 2

Jicarilla Apache Tribe, et al. v. Morton, Civil No. 1089-71 (D.D.C. 1971) 2

National Windlife Federation, et al. v. Morton, Civil No. 1090-71 (D.D.C. 1971) 2

Wilderness Society v. Morton, Civil No. 928-70 (D.D.C. 1970) 2

Yazzi v. Morton, Civil No. 938-71 (D.D.C. 1971) 2

Rules

California Rules of Court, Rule 19 1

Statute

United States Code, Title 28, Sec. 1404 .....1, 2

IN THE

Supreme Court of the United States

October Term, 1971.
No. 71-1418.

STARLIE LOMAYAKTEWA, *et al.*,

Petitioner,

vs.

HONORABLE HOWARD F. CORCORAN, United States District Court Judge, ROGERS C. B. MORTON, individually and in his capacity as Secretary of the Interior, and PEABODY COAL COMPANY,

Respondents.

Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

By their present Petition for a Writ of Certiorari, petitioners seek review of a denial by the Court of Appeals for the District of Columbia of their application for a Writ of Mandamus to vacate an Order transferring the case to the District of Arizona, pursuant to 28 USC §1404. Basically, petitioners are asking that this Court review a discretionary ruling on an interlocutory order.

Petitioners have made no showing, as required by Rule 19, that "special and important" reasons exist for such a review. No conflict among the circuits concerning the interpretation of §1404 has been alleged. Indeed, none exists. The courts of appeal have uni-

formly held that local controversies which touch the affairs of many persons should be tried "in their view and reach rather than in remote parts of the country." [*Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 509] (1947). Recent cases have held that transfer is particularly appropriate where local environmental considerations form the principal reasons for suit. [*In re Cross-Florida Barge Canal*, 329 F.Supp. 543 (Judicial Panel on Multidistrict Litigation 1971); *Friends of the Earth v. Armstrong*, Civil No. 3273-70 (D.D.C. 1971); *Wilderness Society v. Morton*, Civil No. 928-70 (D.D.C. 1970); and *Yazzi v. Morton*, Civil No. 938-71 (D.D.C. 1971)] The present case is part of a general attack on the power plants involved in *Jicarilla Apache Tribe, et al. v. Morton*, Civil No. 1089-71 (D.D.C. 1971); *and National Wildlife Federation, et al. v. Morton*, Civil No. 1090-71 (D.D.C. 1971). These cases have already been transferred to Arizona.

Petitioners do not actually take issue with the accepted interpretation of §1404. Rather, they claim that the usual rules should not apply because the "prospects for this case ever going to trial are remote."[1] The question now presented, they assert, is whether the District Court abused its discretion in view of the "mere possibility" of any triable issues which would require testimony. The District Court, however, was not persuaded by any such expedient assessment of the case. Judge Corcoran in his transfer Order stated:

> "It is not at all clear that this case can be resolved on motion or cross-motions for summary judgment without taking oral testimony."

---

[1]Plaintiffs' Memorandum of Points & Authorities in Opposition to Motions to Transfer, p. 11.

Petitioners nonetheless persist in this approach, still stating that the District Court "seemed to be receptive to the idea" that the second and third causes of action could be disposed of by summary judgment.[2] (Petition, p. 8.) Quite to the contrary, the District Court's Order explicitly states that the third cause of action appears "in particular, to involve factual issues as to the nature and even existence of the separate Hopi factions." The Court ordered the transfer "in view of the strong possibility that this case may survive summary judgment motions and go to trial," in which case "the testimony of Hopi Indians and other witnesses living in Arizona would be required." Surely the place of trial cannot be determined upon the assumption that there will be no trial, or based upon speculation as to the outcome of motions not yet heard, and in some instances not yet filed. In any event, the result that the petitioners are seeking is that this Court review the District Court's determination that the resolution of this case is likely to necessitate the taking of oral testimony. Such an issue does not warrant review by this Court.

While petitioners attempt to posture this case merely as a suit to review an administrative act of the Secretary of the Interior, involving legal issues only, it is in truth an internal dispute among members of the Hopi Indian Tribe. The complaint involves innumerable local factual issues. In 1966, the Hopi Tribal Council entered into a mining lease now held by the defendant Peabody Coal Company. A similar lease was also made with the Navajo Tribe, since title to the leased Black Mesa lands rests jointly with the Hopi and Navajo

[2]While the plaintiffs have stated several times that they expect to file such motions for summary judgment, they have not done so.

Tribes, subject to the trust title of the United States. Plaintiffs represent a dissident faction of Hopi Indians, and the sole purpose of this suit is to void the Peabody lease. Their principal attack is against the actions of the Hopi Tribal Council, and the real parties in interest are the parties to the lease, namely the defendant Peabody Coal Company and the members of the Hopi and Navajo Tribes, acting through their respective Tribal Councils.

Petitioners' complaint alleges that the Hopi Tribal Council, by entering into the mining lease, exceeded its intended authority under the Hopi Constitution, and violated rights intended to be reserved to plaintiffs in the Black Mesa lands. A second cause of action alleges that five members of the Hopi Tribal Council, essential for a quorum, were improperly seated at the time the lease was approved in 1966. And a third cause of action charges the Secretary of the Interior with having engaged in a "pattern and practice of discriminating against the traditional Hopi people and in favor of other factions;" having violated his fiduciary duty "to ensure the survival of traditional Hopi culture, religion, and way of life;" and having arbitrarily interfered "with the internal affairs of the Hopi Tribe, thereby making it possible for the Black Mesa Strip Mining Lease to be executed and approved." (Complaint, pp. 18-19.) Local issues of fact concerning tribal beliefs, structure and activities are embraced within the allegations of each of the three causes of action, and clearly such allegations require tribal testimony. The District Court acted well within its discretion in transferring the case to the home area of the people most affected.

The true reasons underlying plaintiffs' resistance to the transfer Order have not been mentioned in their

petition. Before the Court of Appeal petitioners suggested that all federal judges in Arizona were "subject to being influenced by outside interests" and that any decision adverse to plaintiffs "carries on its face an appearance of impropriety." (Petition for Writ of Mandate, p. 21.) Consistent with this view, they labeled the District of Arizona an "oppressive" and "hostile" forum, which for good reason they had "shunned." (*supra*, pp. 22, 18.) Appropriately, these arguments have not been renewed in the present petition. They explain, however, what petitioners are really trying to accomplish.

Conclusion.

No issues of law are involved in this petition, and no grounds exist for review by this Court. The District Court is vested with broad discretion in determining the place of trial, and the exercise of that discretion has already been upheld by the Court of Appeal. The Petition for Writ of Certiorari should be denied.

Dated May 26, 1972.

Respectfully submitted,

JAMES W. MCDADE, ESQ.,
Attorney for Defendant
Peabody Coal Company

Of Counsel:

BEST, BEST & KRIEGER,
MARVIN O. YOUNG, ESQ.,
MCDADE AND LEE.